

in the Sarangan case. On this ground alone, for my own part, I would hold that the respondents do not deserve to be indemnified by the appellants for carrying out their instructions. It lies ill in the mouth of the respondents to take advantage of their own wrongdoing at the expense of the innocent party.

I would accordingly allow the appeal with costs here and in the court below, and order that the registration of the judgment be set aside.

Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J. concurred.

Appeal allowed.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

MARIMUTHU v. THIRUCHITAMBALAM

[A.C.J. (Gill J.) December 20, 1965]

[K.L. — Civil Appeal No. 21 of 1965]

Husband and Wife — Maintenance — Application for — Whether proceedings are civil or criminal — Hindu marriage — Husband bringing another woman into house and treating wife with cruelty — Offer of husband to maintain wife on condition of her living with him — Whether refusal of wife justified — Married Women and Children's (Maintenance) Ordinance, 1950, ss. 3 & 5.

This was an application for maintenance. The parties were Hindus. About three years after the marriage the husband (respondent) brought another woman into the house and soon after started ill-treating the wife by scolding her, beating and assaulting her. The husband then took the wife and children to her mother's home where they stayed. During this period the husband married the other woman who had been brought into the home. Sometime later the wife returned to stay with the husband but differences arose between them. The wife could not tolerate the presence of the other wife and after a year she again returned to her mother's house. The husband orally agreed to pay \$100 for the maintenance of herself and the children and he paid this regularly for six years. After that however the husband asked the wife to stay with him and the other wife. The wife refused and the husband then discontinued payment of the monthly allowance for two years, after which the wife instituted proceedings to claim maintenance. The learned magistrate dismissed the application at the close of the wife's evidence on a submission of no case to answer as he held that a Hindu wife was not entitled to refuse to live with her husband merely because he had taken another wife. The wife appealed.

Held: (1) maintenance proceedings are civil in nature and the learned magistrate in this case should have asked the counsel for the defendant-husband to elect whether or not he would call any evidence before he could submit there was no case to answer;

(2) a wife is entitled to live with that amount of decency and dignity which prevails in her class and if the treatment of the husband towards her does not permit her to lead such a life, his conduct amounts to neglect and refusal to maintain within the meaning of section 3 of the Married Women and Children (Maintenance) Ordinance;

(3) in the circumstances of this case, where there was uncontradicted evidence of the ill-treatment of the wife by the husband, the wife had sufficient cause for living apart from the husband and therefore an order for maintenance should be made against him.

Cases referred to:—

(1) *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] A.C. 147.

(2) *Chew Cheng Swee v. Chan Chye Neo* [1932] M.L.J. 5.

(3) *Kok Heng Chow v. Lay Mee Yin* [1948] M.L.J. 157, 158.

(4) *Stewart v. Stewart* [1952] M.L.J. 211.

(5) *Ponnambalam v. Saraswathi* A.I.R. 1957 Mad. 693 at p. 694.

CIVIL APPEAL.

K. L. Devaser for the appellant.

S. D. K. Peddie for the respondent.

Cur. Adv. Vult.

Gill J.: This is an appeal from a decision of the magistrate's court, Kuala Lumpur dismissing the appellant's application for an order requiring the respondent as her husband to pay a monthly allowance for the maintenance of herself and her two children.

The facts of the case as found by the learned magistrate are as follows.

The parties were married according to Hindu rites at the Mariaman Temple in Kuala Lumpur on 3rd November, 1949 and there are two daughters of the marriage aged 15 and 14 respectively. The respondent had married previously but his wife had died leaving four children.

About three years after marrying the appellant, the respondent brought another woman into the house to help in the household work and to look after one of the children. Soon after this he started ill-treating the appellant by scolding, beating and assaulting her after taking alcoholic drinks. At times these assaults took place in the presence of the newly acquired domestic servant. Apart from assaulting her, he would sometimes accuse her of putting some medicine into his drinks whenever he felt giddy after taking alcoholic drinks, and refuse to talk to her. Because of these occurrences the appellant went without food for days. The respondent then took the appellant from Alor Gajah, where they were staying, to her mother's house in Kuala Lumpur.

The appellant lived with her mother in Kuala Lumpur for about two years and her two children stayed with her. During this period the respondent married the woman who had gained entrance into the house as a domestic servant. The appellant was not informed of this intended marriage, but apparently she came to

know about it on receipt of some anonymous letter.

Some time in 1954 the respondent took away the elder daughter from the appellant's custody. As the girl was always crying for her mother, both parents agreed that the appellant should return to stay with the respondent. The appellant stayed with the respondent for about a year, but similar differences as before arose between them. The appellant could not tolerate the presence of the other wife and refused to stay under the same roof with her. She therefore asked the respondent to take her to her mother's house. This the respondent did, and the appellant and her two children have been staying with her mother ever since.

After the appellant had gone to live with her mother the second time, the respondent orally agreed to pay her a sum of \$100 a month. Payment of this sum was made regularly for six years without default, but after that period the respondent asked the appellant to stay with him and his wife. The appellant refused, whereupon the respondent discontinued payment of the monthly allowance for two years, after which the appellant instituted these proceedings in the magistrate's court to claim maintenance. Since the commencement of these proceedings the respondent has been paying \$60 per month and he has also paid for the children's school fees, bus fare and the cost of books.

There was evidence before the magistrate that the respondent had approached the appellant many times about returning to stay with him, but she had refused. In answer to a number of questions put to her under cross-examination the appellant said that, if the other woman was not living with the respondent, she would be willing to stay with him. She had stated earlier in her evidence that she refused to stay with her husband because she was afraid that he would scold and assault her in the presence of his other wife. She had been forced to leave him because of his scolding, beating and assaults which started after the other woman came in. Moreover, she had stayed with him after he had married the other woman for one year and he had assaulted her in front of his other wife. It was for that reason that she had asked him to take her to her mother's house the second time.

On a question being raised at the close of the appellant's evidence as to whether the proceeding before the court was criminal or civil, the learned magistrate held that the proceeding should follow the Criminal Procedure Code. This he apparently did because of provisions of section 10 of the Ordinance. It was then submitted on behalf of the respondent that, as the appellant had refused to live with her husband without any sufficient reason, there was no case

A for him to answer. It was pointed out that there are no restrictions as to the number of wives which a Hindu living in this country can have because the statute abolishing polygamy amongst Hindus in India could not be said to be applicable in this country. It was also urged upon the magistrate on the strength of some Indian authorities that a Hindu wife was not entitled to refuse to live with her husband merely because he had taken on another wife. The learned magistrate considered the Indian authorities highly persuasive and came to the conclusion that the appellant and her children should not be given maintenance if the husband was willing to take them back. He therefore dismissed the appellant's complaint.

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D On the grounds raised in support of this appeal the first question which I have to decide is whether a maintenance proceeding by a wife against her husband under section 3 of the Married Women and Children's (Maintenance) Ordinance, 1950 (hereinafter called "the Ordinance") is a criminal or a civil cause or matter.

E In the case of *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* ⁽¹⁾ the House of Lords held that the test as to whether a proceeding was a criminal cause or matter depended upon the nature and character of the proceeding; if the matter was one of the direct outcome of which might be the trial of the person charged and his possible punishment for an alleged offence, the matter was criminal.

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H It is to be observed that the Ordinance under which the application for maintenance is made does not make the failure to maintain the wife and children punishable. The person against whom the application is made under the Ordinance is not charged with the commission of an offence, and he is not proceeded against as an accused person. It therefore follows that any proceeding under the Ordinance up to the stage at which an order for a monthly allowance is granted or refused is not of a criminal nature, nor can the hearing of an application for any variation of an order previously made be said to be in the nature of a criminal proceeding, although later proceedings for the enforcement of the order may be said to be criminal in view of the fact that the court may either levy or sentence the defaulter to a term of imprisonment for disobedience of the court's order.

I The relief granted under the Ordinance is essentially of a civil nature. As was stated in *Chew Cheng Swee v. Chan Chye Neo* ⁽²⁾ by the members of the Appellate Court of the Straits Settlements, an order in a maintenance proceeding for the payment of an allowance creates a civil debt. In *Kok Heng Chow v. Lay Mee Yin* ⁽³⁾ Evans J. said that maintenance proceedings "are a civil claim for money due from him

(the husband) by a person he is bound to support." These two cases were cited with approval by Spenser Wilkinson J. in *Stewart v. Stewart* ⁽⁴⁾ in holding that an application by a wife for maintenance for herself and her children or an application by the husband to vary the amount ordered to be paid by way of maintenance is a civil matter.

The criminal process applied to these proceedings by virtue of section 10 of the Ordinance is applied for the purpose of summary and speedy disposal of the matter in the interests of society. This process, in my opinion, cannot detract from the nature and character of the proceeding which, in my opinion and on the authorities I have cited, is a civil cause or matter. Section 10 speaks of the application being "made and heard" and not "determined" in accordance with the provisions of the Criminal Procedure Code. The learned magistrate should have therefore asked the defendant/respondent's counsel to elect whether or not he would call any evidence before he could submit that there was no case to answer.

The other grounds of appeal boil down on the question as to whether a wife is entitled to maintenance when she is living apart from her husband in spite of his repeated invitations to her to live with him. In this connection section 5(2) of the Ordinance provides that no wife is entitled to receive an allowance from her husband if without sufficient reason she refuses to live with her husband. In other words, if the husband is willing to maintain her, the wife cannot refuse to live with him and still claim an allowance unless she can adduce sufficient reason for this refusal.

Ordinarily the husband's *bona fide* willingness to maintain his wife would be a sufficient answer to her petition. Circumstances may, however, arise when the court may consider that it would not be proper for the wife to live with the husband, and then the wife may be permitted to live separately and yet claim maintenance. All such circumstances have reference to the comfort and safety of the wife, and they have no bearing upon conjugal relations such as want of affection on the part of the husband. This, to my mind, would be a correct interpretation of section 5(1) of the Ordinance under which the court has the power to make an order for maintenance if it is satisfied that for some reason it would be just to make such an order notwithstanding the husband's offer to maintain his wife on condition of her living with him and her refusal to do so.

Thus, where an offer is made by the husband to maintain his wife on condition of her living with him, the court has to consider whether the offer is genuine and made *bona fide* and not with the object of escaping obligation and, if the wife

A refuses it, whether she has sufficient reason for refusing to live with her husband. If a wife chooses for purposes of some advantage to herself not to live with her husband, she cannot say that it is the husband who has refused to maintain her and has neglected her. On the other hand, if the husband is guilty of cruelty or is guilty of any other misconduct which makes it difficult or undesirable for the wife to live with him, it would certainly constitute a sufficient reason under section 5(2) of the Ordinance.

It is not necessary for the wife to prove habitual ill-treatment. If she has been ill-treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband. In such a case the husband, who is the guilty party, must maintain his wife. Causing a wife to leave by ill-treatment is tantamount to driving her deliberately from the home. The fact of the husband marrying a second time is a factor to be taken into account in considering whether the offer is *bona fide* or not. A husband's offer to take the first wife back and treat her well may well be considered insincere where her ill-treatment in the presence of the second wife was the cause of her leaving her husband.

A magistrate should bear in mind in cases of this nature that it is wrong to dismiss an application by the wife on the mere offer of the husband to maintain her without making a finding as to the sufficiency or otherwise of the wife's reasons for refusing to live with her husband and giving his reasons for such a finding.

In the present case the learned magistrate has stated that no sufficient reason was adduced by the appellant to warrant the court to take the case out of section 5(2) of the Ordinance, but that finding of the magistrate, to my mind, is clearly based on the appellant's admission under cross-examination that the presence of the second wife in the respondent's house was the only reason she had for staying apart from him and completely ignores the rest of her evidence. This, in my opinion, was a wrong approach to the problem.

A wife's maintenance cannot be refused merely because on account of her poverty of expression or her failure to understand her own motives she is unable to analyse and state fully her reasons for refusing to go back to her husband. It is for the court to examine the circumstances and see if those circumstances are or are not sufficient to justify the wife's refusal to accept the husband's offer.

There was uncontradicted evidence by the appellant of her ill-treatment by the respondent. This ill-treatment obviously started with the

coming into the household of a woman whom the respondent ultimately took as his second wife, and that was the reason why she left him. Her reason for leaving the house on the second occasion was that she resented being assaulted in the presence of the other woman. To my mind there is nothing more humiliating for a first wife than to be assaulted in the presence of a second wife, especially when the second wife had originally come into the household truly or ostensibly as a domestic servant. The haughtiest of women may be prepared to put up with her husband's ill-treatment when she is the sole mistress of the house, but the meekest of them would resent any humiliating treatment in the presence of the other wife.

A wife is entitled to live with that amount of decency and dignity which prevails in her class and if the treatment of the husband towards her does not permit her to lead such a life, his conduct amounts to a neglect and refusal to maintain within the meaning of section 3 of the Ordinance. In my opinion the learned magistrate in coming to his conclusion that the wife's petition in this case should be dismissed was largely influenced by the fact that because a Hindu living in this country is entitled to marry as many wives as he likes, none of his wives is entitled to live apart from him and claim maintenance even if she is ill-treated. In being so influenced he failed to appreciate that social conditions and living conditions today are not the same as when the duties of a Hindu wife were first laid down by the law-givers. To use the words of Ramaswami J. in *Ponnambalam v. Saraswathi*,⁽⁶⁾ "Hardships which wives were prepared to endure in the past, they are not prepared to endure now and I cannot impose upon them anti-diluvian requirements of domestic Hindu households at the present time."

As I have stated above, there was ample evidence to support a finding by the learned magistrate that the appellant had sufficient cause for living apart from the respondent. I would therefore set aside his order dismissing the application.

In the normal course I should remit the case to the magistrate to give the respondent an opportunity to be heard and for the magistrate to make a finding as to the reasonable amount which the respondent should be ordered to pay for the maintenance of the appellant and her children. But, as Mr. Peddie has now informed me that he had argued every point that could properly be taken on behalf of the respondent at the hearing of the application and that in any event he would not have called the respondent to give evidence before the magistrate, I feel that no useful purpose will be served in remitting the case to the magistrate.

In the circumstances, bearing in mind the

A amount which the respondent had paid the appellant over some considerable period, I make an order that the respondent do pay to the appellant a sum of \$100 a month as maintenance for herself and her two children and that this order do take effect from 1st June, 1963. He must also pay the costs of this appeal and of the proceedings in the lower court.

Order accordingly.

Solicitors: *K. L. Devaser; Skrine & Co.*

C MALAYAN BANKING LTD. v. RAFFLES HOTEL LTD.

[F.C. (Tan Ah Tah Ag.C.J., Chua and Ambrose JJ.)
December 22, 1965]

[Singapore — Federal Court Civil Appeal No. 1 of 1965]

D *Company — Appointment of director — Whether person who is not member of a company or party to the articles can acquire rights under articles — Companies Ordinance, (Cap. 174), s. 22(1).*

This was an appeal against the decision of Winslow J. (reported in [1965] 1 M.L.J. 262).

E In July 1933 the benefit of the lease of the land on which part of the building known as Raffles Hotel stands was assigned to the respondent company for the remainder of the unexpired term of 70 years subject to all the covenants and conditions contained in the original lease. Subsequently in 1963 the appellant company acquired the leasehold reversion of the said land subject to and with the benefit of the original lease. The appellant company was thus in the position of lessor and the respondent company lessee thereof.

F Clause 14 of the original lease provided that the lessee should not without the previous licence in writing of the lessors assign or sublet the premises or any part thereof, such licence not to be unreasonably withheld. It also provided that if the assignee or sub-lessee be a limited company no consent shall be given unless the articles contained a provision that from time to time during the continuance of the demise the lessor shall have power to appoint a director not subject to retirement by rotation, but any director so appointed shall not be a person interested in or connected with any business of a similar nature to the lessee. Article 77 of the articles of association of the respondent company provided that the lessor may appoint, *inter alia*, itself to be a director of the company.

G The appellant company in pursuance of the said article purported to appoint itself as director of the respondent company and the respondent company sought declarations that article 77 must be read in conjunction with clause 14 of the lease and that the appellant bank's appointment as a director pursuant to article 77 was invalid and alternatively for a declaration that the appellant bank cannot act as a director of the respondent company and an injunction to restrain the appellant bank from purporting to act as such director.

I The learned judge held that (1) article 77 of the articles of association of the respondent company did not confer any contractual right on the appellant company to appoint itself a director of the respondent company; (2) clause 14 of the lease did not confer any such contractual right on the appellant company; (3) in the absence of a binding contract entitling the appellant company to appoint a director of the respondent company the right given by article 77 to the appellant